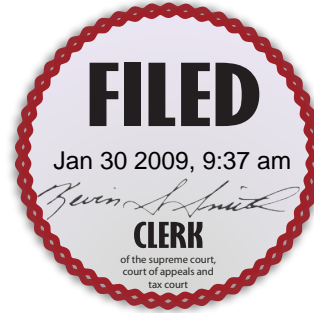


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ARTHUR LEE GATES, JR.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 82A01-0806-CR-302

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0705-FA-468

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Arthur Lee Gates, Jr. was convicted of Class A felony Rape,¹ Class D felony Residential Entry,² and Class D felony Confinement,³ for which he received an aggregate sentence of forty-eight years executed in the Department of Correction. Upon appeal, Gates contests his sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

On the night of May 22, 2007, Gates knocked on the door of B.D.'s residence at 517 Covert Avenue in Evansville and forced his way inside. B.D. has a mental disability and lives alone with her dog. B.D. recognized Gates, who was her neighbor's acquaintance. Gates engaged B.D. in a lengthy conversation about various topics. At some point Gates pulled out a gun, pointed it at B.D., and threatened to shoot both B.D. and her dog if she would not have sex with him. As B.D. repeatedly refused, Gates choked B.D. and hit her in her face multiple times with his fists, breaking her glasses and cutting her forehead. Gates locked the front door and pushed B.D. into her bedroom. In her efforts to escape from Gates, B.D. bumped her head against a wall and against the dresser in her bedroom, cutting her head. Gates told B.D. to remove her clothes, then forcibly removed her nightgown and panties. Gates placed his penis into B.D.'s vagina and licked her breast. According to B.D., Gates subsequently ejaculated onto her breast and passed out on her bed.

¹ Ind. Code § 35-42-4-1 (2006).

² Ind. Code § 35-43-2-1.5 (2006).

³ Ind. Code § 35-42-3-3 (2006).

B.D. then dressed herself in shorts and a gown, fled the house with her dog, and flagged down Evansville Police Officer Donald Thompson, who was nearby. When Officer Thompson and other authorities, including Sergeant Brent Hoover, arrived at B.D.'s home, they found Gates on the bed in the bedroom, clothed only in pants pulled down around his ankles. Gates, who smelled of alcohol, appeared to have passed out. A weapon appearing to be a handgun was on the floor next to the bed.⁴ After another officer kicked the mattress, Gates sat up, clenched his fists and cursed. Sergeant Hoover used a taser to subdue Gates.

Subsequent medical examinations revealed a tear to B.D.'s hymen, a four-centimeter laceration to her head requiring staples, and multiple facial bruises and scratches. DNA tests performed on a substance found on B.D.'s left breast revealed results consistent with Gates's DNA profile.

On May 24, 2007, the State charged Gates with Class A felony rape (Count 1), Class A felony criminal deviate conduct (Count 2), Class A felony burglary (Count 3), and Class D felony criminal confinement (Count 4). On August 8, 2007, the State filed an additional information alleging, with respect to Counts 1 and 2, that Gates was a repeat sexual offender. A jury trial was held on April 23-25, 2008, after which the jury found Gates guilty of Class A felony rape in Count 1; Class D felony residential entry, as a lesser included offense of burglary, in Count 3; and Class D felony confinement in

⁴ The weapon was later determined to be a plastic replica of a handgun. At the time of the incident, B.D. had believed it to be a real handgun.

Count 4.⁵ Accordingly, the trial court entered judgment of conviction on each count. Following this verdict, the State dismissed its repeat sexual offender information.

At Gates's sentencing hearing, defense counsel did not argue the existence of any mitigating factors, and the trial court found none. Instead, the trial court found multiple aggravating circumstances, including B.D.'s mental disability causing her increased vulnerability, Gates's criminal history consisting of past convictions for burglary and attempted rape, Gates's use of excessive physical violence beyond that necessary to perpetrate the rape, and Gates's commission of the rape in B.D.'s home in light of his criminal history. Based upon these factors, the trial court sentenced Gates to enhanced terms of forty-eight years in the Department of Correction for Count 1, and two and one-half years in the Department of Correction for each of Counts 3 and 4, to be served concurrently with his sentence in Count 1, for an aggregate executed sentence of forty-eight years. This appeal follows.

DISCUSSION AND DECISION

I. Mitigating Circumstances

Gates first argues that the trial court erred in failing to consider certain mitigating circumstances, specifically that the crime was a result of circumstances unlikely to recur. Even a superficial review of the record would seem to refute the existence of such a mitigator given Gates's uncontested criminal history involving the very sorts of crimes at issue here. But we need not consider the merits of Gates's claim on this point because defense counsel failed to argue it or any other mitigating circumstances at the sentencing

⁵ The jury acquitted Gates of criminal deviate conduct as charged in Count 2.

hearing. As a general proposition, the trial court does not abuse its discretion in failing to consider a mitigating circumstance that was not raised at sentencing. *Anglemyer v. State*, 868 N.E.2d 482, 492 (Ind. 2007) (“*Anglemyer I*”), clarified on reh’g by *Anglemyer v. State*, 875 N.E.2d 218, 220 (Ind. 2007) (“*Anglemyer II*”).

II. Appropriateness

Gates also challenges the appropriateness of his forty-eight-year sentence in Count 1. Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” *Anglemyer I*, 868 N.E.2d at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the “Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” We exercise deference to a trial court’s sentencing decision, both because Rule 7(B) requires that we give “due consideration” to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant’s burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Gates was convicted in Count 1 of Class A felony rape. Pursuant to Indiana Code section 35-50-2-4 (2006), a person who commits a Class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty

years. In sentencing Gates to forty-eight years, the trial court enhanced his sentence by eighteen years.

Gates's aggravated sentence is sustainable on the facts of his case alone. Gates threatened, beat, stripped, and forcibly raped a mentally disabled woman at gunpoint in the middle of the night in her own home. To the extent that Gates's apparent acquaintance with the victim is relevant, as Gates claims it is, it worsens his crime, demonstrating his familiarity with and exploitation of this specific victim and her disability. If this were not enough, Gates's criminal history, which includes past crimes of attempted rape and burglary, demonstrates his apparent proclivity toward particularly violative acts.⁶ We are fully persuaded that his forty-eight-year sentence is appropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.

⁶ The record does not contain Gates's pre-sentence investigation report. Gates does not dispute his criminal history, as recited by the trial court, of attempted rape and burglary.